In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1056

JOSEPH BERNARD DROBACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a grand jury witness who has been granted use immunity (1) has a statutory right to refuse to answer questions based upon evidence obtained from a court-ordered wire interception that has been sustained as valid after a full evidentiary hearing and (2) has a constitutional right, notwithstanding this Court's contrary decision in *United States* v. *Calandra,* 414 U.S. 338, to refuse to answer questions based in part upon illegally seized tangible evidence.

On November 11, 1974, the United States District Court for the Southern District of California adjudged petitioner in civil contempt under 28 U.S.C. 1826(a) for refusing to testify before a grand jury. The court committed petitioner to imprisonment, for not more than 18 months, until such time as he testi-

fies or for the life of the grand jury (Pet. App. 1-2).[1] On December 26, 1974, the court of appeals affirmed the contempt order in a *per curiam* opinion (Pet. App. 1-2).[2]

On March 15, 1973, in the United States District Court for the Southern District of California, petitioner and several co-defendants were charged with possession and distribution of LSD, in violation of 21 U.S.C. 841 (a)(1), 843, 846 and 963. Petitioner and his co-defendants moved to suppress the fruits of a court-authorized wire interception, alleging, *inter alia,* that the government had failed to minimize the scope of authorized interceptions, that there had been no showing that other investigative means were inadequate or too dangerous, and that the Attorney General had not authorized the application (Pet. 7, note). After protracted hearings, United States District Judge Gordon Thompson, Jr., denied the wire interception suppression motions.[3]

On July 23, 1974, however, Judge Thompson granted petitioner's motion to suppress certain evidence obtained as the result of a search of the apartment of Julie Nugent, with whom petitioner then resided. This evidence

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[1]The life of the grand jury is now scheduled to expire on November 20, 1975.

[2]Petitioner had been admitted to bail pending appeal. On January 29, 1975, the court of appeals revoked petitioner's bail. On February 11, 1975, Mr. Jstice Brennan denied petitioner's request for bail pending the filing of a petition for a writ of certiorari.

[3]Petitioner's co-defendants were subsequently convicted and have appealed from those convictions on the ground, *inter alia,* that the suppression motions should have been granted. *Abascal* v. *United States,* Nos. 74-3439 and 75-1093 (C.A. 9); *Frakes* v. *United States,* No. 75-1026 (C.A. 9).

included a notebook containing, among other things, the telephone number of one Michael Green. Evidence discovered during this search led to the discovery, in a garage rented by petitioner under an assumed name, of an extensively equipped, dismantled laboratory that had been used in the manufacture of LSD.

Thereafter, the government dismissed the indictment against petitioner and, on August 29, 1974, obtained a court order granting petitioner "use" immunity in order to compel him to testify before the grand jury and at the trial of his former co-defendants (Pet. App. 1).

On September 4, 1974, petitioner appeared before the grand jury and was asked a series of questions about his acquaintance with Michael Green, five other named individuals, and a named corporation. Petitioner refused to answer the questions, asserting, *inter alia,* that they were based upon evidence seized from him in violation of his Fourth Amendment rights (Pet. 4).

That afternoon, after a hearing before United States District Judge Edward J. Schwartz, petitioner was ordered to reappear before the grand jury to answer questions. Upon his reappearance, he remained recalcitrant and repeated his refusal. Petitioner was again brought before Judge Schwartz, and the court set November 7, 1974, for petitioner to show cause why he should not be held in contempt (Pet. App. 2).

At the show-cause hearing, Judge Schwartz took judicial notice of the documentary evidence submitted at the suppression hearing before Judge Thompson but rejected petitioner's request that he reexamine Judge Thompson's decision upholding the lawfulness of the court-authorized wire interception, stating that "to go back and attempt to relitigate

all of the suppression issues that were raised in that case would be pointless" (Tr. 48, November 7, 1974; see *id.* at 41, 45). At the conclusion of the hearing, petitioner was held in contempt. The court of appeals affirmed (Pet. App. 3-4).

1. Petitioner contends (Pet. 6-9) that a grand jury witness who has been granted use immunity may refuse to answer questions based upon evidence obtained through use of a court-ordered wire interception, the validity of which has already been upheld after a full evidentiary hearing, upon the witness's mere allegation that the interception failed to comply with the requirements of 18 U.S.C. 2515. That contention does not warrant review by this Court.

In our view, a grand jury witness who has been granted immunity to testify is not entitled to a plenary suppression hearing to test the legality of the court-ordered wire-interception upon which the grand jury's questions may be based. See *In re Persico,* 491 F.2d 1156 (C.A. 2), certiorari denied, October 21, 1974 (No. 73-1741). We realize, however, that this Court has reserved judgment on that issue (see *Gelbard* v. *United States,* 408 U.S. 41, 61, n. 22) and that not all courts have agreed with our position. See *In re Lochiatto,* 497 F.2d 803 (C.A. 1). But this case, notwithstanding petitioner's assertions to the contrary (Pet. 6-7), does not raise that issue or involve any conflict with *Lochiatto.* For in this case petitioner did litigate the validity of the court-ordered wire interception and obtain an adjudication of that wire interception's validity prior to the time of his refusal to answer the grand jury's question.

In contrast, *Lochiatto* did not involve a case in which the validity of the interception had already been upheld. The court there merely undertook to ensure that the

recalcitrant witness would be afforded some hearing for a determination of the validity of the court-ordered interception (497 F.2d at 808):

> There should be an opportunity for inspection of these limited materials: the authorized application of the Attorney General or his designate, 18 U.S.C. §2516(1), the affidavits in support of the court order, the court order itself, and an affidavit submitted by the government indicating the length of time the surveillance was conducted. No evidence need be provided the defendant for the purpose of litigating the issues of truth of statements made by affiants or the "minimization" of federal officials in monitoring conversations.

Here, petitioner has been afforded a broader review than that contemplated in *Lochiatto*. He fully litigated the validity of the authorization and execution of the authorized wire interception in a protracted suppression hearing. The adverse ruling he there received makes his claims of illegality patently insufficient as a defense to contempt.[4]

Moreover, even under *Lochiatto* petitioner would not have been entitled to a hearing. The First Circuit in *Lochiatto* expressly stated that no hearing would be required with regard to claims of failure to minimize and challenges to the veracity of statements made by affiants, and petitioner's principal contentions—that

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[4]Petitioner now contends (Pet. 8) that the prior adjudication was not binding because, since the indictment against him was later dismissed, he was unable to take any appeal from the denial of the motion to suppress. That contention, however, merely raises a subsidiary question, apparently unique to this case, concerning the proper scope of the doctrine of *res judicata*.

the monitoring officers failed to minimize, that the affidavits supporting the application falsely alleged the insufficiency of other investigatory means, and that the application falsely stated that it was authorized by the Attorney General—are of that kind.

2. Petitioner also contends (Pet. 9-12) that a grand jury witness may refuse to answer questions based in part on illegally seized evidence. But in *United States* v. *Calandra*, 414 U.S. 338, this Court determined that the exclusionary rule developed in effectuation of the Fourth Amendment does not extend to grand jury proceedings. There is therefore no legal basis for petitioner's refusal to testify.

Petitioner, relying upon *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, argues that this case differs significantly from *Calandra* in that the evidence on which the grand jury's questions were based was the fruit of a search—the search of Ms. Nugent's apartment— that had already been adjudicated unlawful. But *Silverthorne*, as this Court noted in *Calandra* (414 U.S. at 352-353, n. 8), was a case in which documents were sought for their use in a criminal trial and which involved defendants who were invoking the exclusionary rule on the basis of their status as criminal defendants. In contrast, the testimony sought here is needed by the grand jury to perform its investigative function, and petitioner, who has received use immunity and is not a criminal defendant, is not entitled to invoke the exclusionary rule. Cf. *Kastigar* v. *United States*, 406 U.S. 441. Moreover, as the Court further noted in *Calandra*, 414 U.S. at 353, n. 8, *Silverthorne* "has been substantially undermined by later cases."

Furthermore, the fact that there has already been an adjudication that evidence was illegally seized does not set this case apart from the principle upon which *Calandra* was in part based, *i.e.*, that "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties" (414 U.S. at 350). A prior adjudication that evidence was illegally seized does not lay to rest the question whether the interrogation of the witness is in fact the fruit of the illegally seized evidence or has a lawful, independent source; permitting a witness to assert a Fourth Amendment basis for refusing to answer questions before the grand jury would simply invite time-consuming litigation over the source of the interrogation, with attendant interference with the proper functioning of the grand jury.

In particular, we are informed by the government attorneys responsible for presenting evidence to the grand jury in this case that several of the questions asked of petitioner had a source wholly independent of the search of Ms. Nugent's apartment and that the remaining questions, although immediately prompted by the fruits of that search, probably or possibly would have emerged from the investigation of the activities of petitioner and his associates even if that search had never been made. It is therefore arguable that petitioner could have been required to answer those questions even as a witness in a criminal trial. See, *e.g.*, *United States* v. *Falley*, 489 F.2d 33, 40-41 (C.A. 2). In short, extension of the exclusionary rule to grand jury proceedings in the circumstances of this case would invite the delay and interference with the grand jury that the decision in *Calandra* sought to avoid.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.